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ABSTRACT

As public humanities programs increasingly make use of media products, an understanding of copyrights is essential. Some problems pertaining to copyrights may be alleviated by advanced planning, a clear division of responsibilities, and by using reason to determine that policies are workable and fair. The problem involves a growing "product" awareness on the state level, coupled with a need for protection. Copyrights grant exclusive, but not unlimited, rights to the author of original literary, dramatic, musical, artistic, and other intellectual works. Eligibility is contingent on two criteria: a fixed, tangible form; and "original, creative authorship." Among those works that are ineligible for copyright are those produced by the federal government. Statutory copyright has three levels--notification, deposit, and registration--each with unique stipulations and time limits. Ownership may be transferred in whole or part, and is maintained for the life of the author plus 50 years. Copyrights are limited by "fair use," which depends on the purpose of the use, the length of the portions used, the nature of the work, and the effect of the use on the work's market value. Owner permission is the key to effective copyright use. To avoid conflict, communication concerning copyrights must take place prior to contractual commitment. (JK)

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A GUIDE FOR PUBLIC HUMANITIES PROJECTS

by

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A GUIDE FOR PUBLIC HUMANITIES PROJECTS

INTRODUCTION

A longer version of this essay was originally written as background material for the 1978 annual meeting of the state humanities programs. The conference was peopled primarily by committee and staff members, the policy-makers and dayworkers in the state humanities' bureaucracies. The heart of the annual meeting was a series of workshops built around issues of common concern to the state committees. Copyrights were high on the list of priorities.

Not all public humanities programs require attention to copyright. Generally speaking it is only those which involve production or use of media products (film, reprints and exhibits, etc.).

As you read the essay you might keep three ideas in mind, concepts which are, I suspect, particularly germane to your own approach to copyrights.

Advanced Planning: Most copyright problems seem to arise from lack of forethought. As you design your project, indeed, your application for funding, look critically at those areas where copyright will come into play. Do you plan to interview anyone and, if so, have you thought about release forms? Do you plan to use copyrighted materials in your own project--i.e. music or prose? What rights do you wish to extend to people who are creating materials in conjunction with your project--e.g. someone who is preparing a paper to be delivered? How does your distribution plan affect copyright? Can you legally do what you say you're going to do? What about financial questions? How does accrued income affect your relationship with the state committee? Clearly, these and other issues should be integrated into the planning; when they are the afterbirth of the project you run the risk of major complications and strained relations with your state committee.

Clear Division of Responsibilities: Who will be doing what in terms of distribution? You must decide which rights you want to retain and which are best vested with some other agency. Every project is different, and in some cases you might want a tight control over distribution while in others you might

wish to diffuse responsibility. Look at your project critically and ask those difficult questions about ownership, income, assignment of subsidiary rights, and so forth. Also, read your state committee's guidelines and contract carefully. Find out what the committee's position is on these issues before submitting your application.

Rule of Reason: No policy is worth its ink if it is not workable and fair. This means that both sides, the state committee and the project director, must be flexible and tolerant. If you see problems on the horizon, try to work them out before they fester. Also, be as consistent and clear as possible. If you strike a bargain with your state committee, keep to it--and expect them to do the same. The interpretation of the rules may change during the course of the grant, but the rules themselves should remain the same in fairness to both parties.

This brief report is plainly meant to be introductory -- to introduce the copyright ground rules of potential interest to project directors. The policy choices facing the state humanities councils are a more complex matter indeed. You are invited to pursue them by consulting the larger version of the essay available from your state council.

THE PROBLEM

In scouring my library for a proper allegory for an essay on copyrights and the public humanities projects, I naturally gravitated towards two parables: Virgil leading Dante into the Inferno and the White Rabbit enticing Alice into Wonderland. My hand finally came to rest upon Wonderland. I really do not think that we must go through "Inferno" and "Purgatory" to reach the "Paradise" of a reasonable understanding of copyrights. Nor do I think that we must cower unnecessarily under a portal inscribed, "Abandon hope all ye who enter here." Fortunately for all of us, the basic copyright needs of the state humanities councils and their project directors are neither hellish nor hopeless.

However, as tiny Alice quickly discovered, the road to reason is not without its dangers. We must keep our wits about us, taking each problem as it appears, and applying it to the reality of conducting a project. This suggests an important posture or attitude. Viewing the problem from the position of a dayworker in the humanities, a reasonable, working knowledge of copyrights need not be a mastery. As administrators, our primary role is to help shape and implement policy, not to become tangled up in the arcane and particular web of copyrights. Realistically, it will serve no purpose if, at the end of this essay, you are magically transformed into a legal wizard. The legal questions are certainly important and, if you take nothing else from this exposition, you should conclude that when major copyright questions arise, technical assistance from an attorney schooled in copyright law is absolutely imperative.

What has happened over the past few years that copyrights should emerge as a pressing issue with the state committees? Two relatively recent and related developments seem to suggest an answer.

First, there is growing "product" awareness on the state level. Traditionally, the mandate of the state committees has been to stimulate live public discussion--momentary, ephemeral events, if you will. However, as the guidelines governing the activities of the state committees have been expanded, and larger amounts of money are available for grant-making, there has been a climate of experimentation. The transitory events have been joined by the creation of permanent "products"--publications, films, videotapes, audiotapes, displays and the like. These products, by necessity, have brought the Pandora's Box of copyrights.

The second development is a natural extension of the first: a need for protection. The products represent changing legal and financial risks, a shift in nature as well as degree. The creation of media products means an entry into the economic marketplace for the purchase of services and the distribution of goods. For example, quite often our traditional "clientele," academic humanists, have little practical experience in media. So, to create quality media products, we now traffic with a new clientele: producers and distributors, many of whom, in turn, have scant knowledge of the humanities. To corrupt a well-worn cliche, the state committees must walk a tightrope between the interests of those concerned with the "medium" and those concerned with the "message." Clearly, without adequate protections, there is a strong chance that the state committees will become victims of the marketplace. Equally important, though, if "protection" is too oriented towards the state committee, we may suffer a different, yet equally devasting blow from the marketplace: we may be unable to produce good media products, for we risk completely eliminating the economic incentive for media producers and distributors. This tension will only increase as the stakes grow larger. As the state committees become more willing to spend greater sums to insure higher quality and broader distribution, the risks to all parties grow in kind. The more successful our products become, the more important it is to develop equitable and creative ways to protect our "public trust" without discouraging the creative people who help make media projects so appealing to the humanities.

DEFINITION OF COPYRIGHT

No discussion of copyright can progress terribly far without a clear understanding of what is meant by "copyright," and what and who is eligible for protection. Essentially, a copyright grants exclusive, but not unlimited rights to the author of original literary, dramatic, musical, artistic, and other intellectual works. These rights vary depending on the type of work, but generally include:

--The right to print, reprint, and copy the work
--The right to sell or distribute copies of the work
--The right to transform, revise, or adapt the work
--The right to record the work
--The right to perform or display the work publicly.

Only the author can rightfully claim copyright unless the author transfers the right of copyright to another; physical possession of a particular object does not necessarily give the owner of the object copyright privileges. For example, the possession of a particular copy of a novel, even if purchased, does not give the holder the right to make a movie of the book. (Guide[1], 5:1, 5:6-5:8) In the case of "works for hire," such as a report prepared by the staff member of an organization, the employer, not the employee, is considered the "author." (Guide, 5:2-5:3)

ELIGIBILITY

To be eligible for copyright a work must at least satisfy two broad criteria: the work must exist in a fixed, tangible form (from which copies could be reproduced or reconstructed), and the work must represent "original creative authorship." On the whole, the courts require a very low level of "creativity;" the word has more technical than "value" implications, and the statute does not define "creativity" or "originality." Works meeting these requirements are then placed into one of seven broad categories, each with its own specialized criteria for eligibility:

1. Literary works
2. Musical works
3. Dramatic works, including scores of music
4. Pantomimes and choreography
5. Pictorial, graphic, and sculptural works
6. Motion picture/audio-visual works
7. Sound recordings (Guide, 3:1-3:5)

Correspondingly, certain works are ineligible for copyright, including "ideas, methods, systems, principles, common or standard works (such as calendars or tables), and forms and measuring devices." Also excluded are works which are considered "trivial," for they do not show any originality (i.e., variations in typefaces, designs, word choices, etc.) These are examples of insignificant creative authorship. (Guide, 3:6-3:7)

Another important exemption are works produced by the Federal Government. Materials created for the Federal Government by its employees, as part of their employment, cannot be copyrighted and must remain in the public domain. Works produced by Federal employees outside of their employment or on release time--e.g., on sabbatical--can be copyrighted by the employee unless otherwise restricted. Also, the new law requires that whenever a work is published "consisting preponderantly" of one or more works authored

by the Federal Government, the notice of copyright should include a statement identifying those sections either produced or not produced by the Federal Government. The Federal Government may hold copyrights transferred to it by "assignment, bequest, or otherwise." (Guide, 3:7-3:8)

Significantly, the copyright protections in the 1976 Act extend to all unpublished and published works, thus pre-empting the common law protections once afforded on the state level. This Federal pre-emption is one of the hallmarks of the new law, for it creates a truly national system of copyrights and will aid in the protection of once vulnerable unpublished materials. (Guide, 2:1-2:2)

NOTIFICATION, DEPOSIT, REGISTRATION

Statutory copyright has three "levels": notification, deposit, and registration. Notification is affixing the symbol © or the abbreviation "Copr.," the full name of the copyright owner, and the year of first publication to the work. Thus, notice of copyright on this paper might be "© The Federation of Public Programs in the Humanities, 1980." The new copyright law is more flexible in the placement of the notice than was the 1909 Act. The Act does not specify a fixed location but, recognizing the multitude of forms of publication, states only that the notice should be "reasonably placed." For a print piece, this would usually be on or directly after the title page. Also, if for some reason the notice is omitted, or if the work is printed without all of the required information, the work may still be protected. The author must register the work with the Copyright Office within five years of first publication and make a "reasonable effort" to add the notice to copies that are in print and later distributed in the U.S. (Guide, 10:-10:7)

The second level of copyright is deposit. Within three months of first publication of the work with a copyright notice, the owner must deposit two complete copies of the work in the Copyright Office. The Copyright Office then turns these works over to the Library of Congress, which is how the Library stocks its shelves (in case you ever wondered). If the author fails to deposit the work within three months, the Register of Copyrights could demand deposit and levy a fine, although this is rarely done. (Guide, 11:1-11:3)

The most important "level" of copyright, however, is actual registration, which is the formal listing of the work with the Copyright Office. Both published and unpublished works can be registered. Published works require two copies of the piece (which counts as deposit), the application, and $10. Unpublished works require only one copy, a separate application, and $10. (Guide, 11:3-11:9)

Please note: The great inducement to registration, as opposed to mere notification and deposit, is that registration is the only way the owner of a copyright can defend ownership in court. Without registration, the owner must depend primarily upon the deterrent of the copyright symbol. (Guide, 11:9-11:10)

Registration need not be immediate, however. The author can register the copyright well after actual publication, providing that proper notice has been given on all copies. Consider, for example, the professor who writes an essay/lecture for a conference. She assumes that the piece has no commercial value, so she chooses not to register the work (she does include a copyright notice on all copies). However, a year later she discovers the work in a journal under different authorship. The true owner can then register the work and prohibit future abuses. After registering, she can sue for actual damages arising from the abuse up until the registration, and she can sue for any actual and statutory damages, including attorney's fees, occurring after registration. (Guide, 11:9-11:10) The advantage of statutory damages is the greatly reduced burden of proof of damage in court.

OWNERSHIP AND DURATION OF OWNERSHIP

Ownership of the copyright may be transferred in whole or in part, and specific rights under the copyright may be assigned, also in whole or in part. For example, the owner of a copyright can transfer or assign hardcover rights to one party, paperback rights to a second party, and movie rights to a third. Such transfers and assignments require a contractual agreement, and this certification of transfer might be filed in the Copyright Office providing that the transfer bears the actual signature of the persons executing the document, and the work is specifically identified so that the transfer can be matched with the registration. Significantly, the sale of the work does not automatically result in the transfer of copyright ownership rights unless expressly stated. (Guide, 5:6-5:8)

The 1976 Copyright Act has changed the duration of the copyright as well. For works created after 1 January, 1978, the basic term is the life of the last surviving author plus 50 years, while for "works for hire" protection lasts for 100 years from the date of creation, or 75 years from first publication, whichever is shorter. (Guide, 2:3-2:7)

FAIR USE

While ownership of copyright affords the author some distinct protections, there are "fair use" standards which limit the rights of ownership. In a very broad sense, the courts have interpreted "fair use" according to four criteria:

--The purpose and character of the use, including consideration of commercial and nonprofit educational uses

--The length of the portion to be used in relation to the whole copyrighted work

--The nature of the copyrighted work itself

--The effect of the use upon the market value of the copyrighted work (Guide, 8:1)

The 1976 Copyright Act delineates nine categories of "fair use" that are exempt from copyright liability. The most important of these for the state committees are:

--Face-to-face teaching activities

--Instructional broadcasting (as an adjunct to educational activities but not including public broadcasts of an educational or cultural nature intended for the public at large)

--Religious services

--Live performances without commercial advantage to anyone

--Reception of broadcasts in public places

--Non-commercial broadcasts to the blind or deaf (Guide, 8:9-8:13)

Clearly, the most important of these exemptions to the state committees is "live performances without commercial advantage to anyone." As we all know, "noncommercial" programs often do entail the payment of funds for services--i.e., honoraria. The Copyrignt Act specifies that "noncommercial" performances of nondramatic literary or musical works are generally protected from liability provided that no compensation is paid to its performers, promotors, or organizers. Also, the broadcast of such works are not included in this provision, nor are the use of dramatic works such as plays and musical comedies. These have their own requirements for use. The intent of the law is to check abuses arising from the rise of the "nonprofit industry," which represent millions in lost revenue for copyright holders. (Guide, 8:12)

Two areas of particular interest to the state committees are spelled out in the "fair use" provisions: Teaching and scholarly research, and library and archival use. The most relevant regulations for the state committees cover books and periodicals. For teaching purposes, an instructor may make a single copy of the following:

--A chapter of a book
--An article from a periodical or newspaper
--A short story, short essay or short poem
--A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper (Guide, A3:1)

In some instances multiple copies may be made for classroom use, with certain restrictions. The copies may not be used as a substitute for anthologies or collected works; cannot be made of "consumable" materials such as workbooks; cannot be a substitute for purchase, be "directed by higher authority," or be repeated by the same teacher from term to term; and cannot be sold to students above actual copying costs. (Guide, 8:2) In addition, copying must meet the tests of brevity and spontaneity, must not have a negative "cumulative effect," and must contain a notice of copyright on each copy. (Guide, A3:2)

"Brevity" is the arbitrary quantitative dimensions of the allowed copy. A poem, for example, may be used if it is less than 250 words and if it is printed on not more than two pages. A longer poem may be excerpted up to 250 words. Prose is confined to 2,500 words or less for an article, story, essay, or book. Fortunately, you are allowed to exceed the limits to complete a line of poetry or an unfinished prose paragraph (wouldn't that be fun with Milton or Joyce). "Spontaneity" assumes that the inspiration for using copyrighted material and the time of actual use are too close to secure proper permission. (Guide, A3:2-3:3)

"Cumulative effect" seeks to insure that the use does not hurt the future market value of the copyrighted work. The material can be used in only one course, and not more than one short poem, article, story, essay, or two excerpts may be copied from the same author. Not more than three items may be copies from the same collective work or periodical during one class term (only one chart, graph, diagram, drawing, cartoon, or picture), and there cannot be more than nine instances of multiple copying for one course during one class term. (Guide, A3:2-3-4)

A fuzzy area is what actually constitutes a "classroom period." The past decade has witnessed new forms of educational programming not associated with traditional curricula--e.g., continuing education, external degree courses, credit for "life experiences," etc. Do these activities represent a new definition of the "classroom?" If so, would this definition include, say, a public program sponsored by a university using regrant funds? Since "public programming" is not systematic instruction, it would probably not be considered a "classroom" activity, and the state committees should be very cautious about using this definition.

The other major category of "fair use," library and archival, also has its own restrictions. A library or archive is allowed to make and distribute one copy of a copyrighted work so long as the reproduction and distribution are without direct or indirect commercial advantage, the library or archive is either open to the public or open to a special constituency (i.e., scholarly researchers) larger than the immediate staff, and the copied work includes a notice of copyright. (Guide, 8:4)

In addition, however, the library or archive must make its copies under one of the following conditions: archival preservation (unpublished works in the currect collection); replacement of a lost, stolen, damaged, or destroyed work if a replacement cannot be obtained at fair market price; private study, scholarship, or research; and acquisition of a work otherwise unattainable at fair market price (as opposed to replacement of an existing work). (Guide, 8:4-8:5)

As is the case with classroom use, the Copyright Act is quick to anticipate areas of potential abuse. It would be a simple task to organize a consortium of libraries in order to systematically photocopy different materials, exchanging them to mutual benefit. This is expressly prohibited, for the intent of the law is to allow "isolated and unrelated" reproduction. (Guide, 8:7)

The proliferation of cheap, publicly accessible photocopying machines poses a special problem for the library. Understandably, libraries and archives cannot be held accountable for unsupervised or unauthorized use of equipment, nor can they be responsible for the future use of copyrighted materials they provide under "fair use." To be excluded from liability the library must post a notice on the machine warning the user of possible copyright violations.

However, even this exemption from liability has its limits. The library would be responsible if a staff member exceeded the "fair use" provisions in copying material for a client and, significantly, these exemptions only cover literary works; in most cases musical, pictorial, graphic, sculptural work or a motion picture or other audio-visual work (other than one dealing with bona fide news) are not permitted under library "fair use." Nor can "fair use" override any contractual agreement the library has with the copyright owner.

OBTAINING RIGHTS TO USE COPYRIGHTED MATERIAL

Clearly, the key to effective use of copyrighted materials is to obtain permission from the owner. You can determine the owner of the copyright by the information provided in the "notice" in most cases. For more complex situations, you might wish to work through various "clearinghouses" which can facilitate the authorization process. Major facilities include:

--Copyright Clearance Center, Inc., 310 Madison Avenue, New York, New York 10017

--Institute for Scientific Information, Inc., 325 Chestnut Street, Philadelphia, Pennsylvania 19106

--University Microfilms International, Article Reprint Department, 300 North Zeeb Road, Ann Arbor, Michigan 48106

--Educational Resources Information Center(ERIC) National Institute of Education, Washington,D.C. 20208

--National Technical Information Service, Springfield, Virginia 22161

--Information Industry Association, 4720 Montgomery Lane, Suite 904, Bethesda, Maryland 20014

After you determine the owner of the copyright, you should request permission in writing, and include the following information (as prescribed by the Association of American Publishers):

--Title, author, and/or editor, and edition of materials

--Exact material to be used, giving amount, page numbers, chapters, and if possible a photocopy of the material

--Number of copies to be made

--Use to be made of the materials

--Form of distribution (classroom, newsletter, public program)

--Whether or not the material will be sold

--Type of duplication (ditto, photocopy, offset, typeset, etc.) (AAP, "Photocopying by Academic, Public and Nonprofit Research Libraries," Washington, 1978, p. 41)

The request should be sent directly to the author (if an individual owns the copyright) or to the Permissions Department of the publisher. You should be sure to allow enough time to secure permission, and remember to double check your request to make sure you have enclosed all relevant data. Insufficient information, perhaps more than anything else, bogs down the permission process. If you have multiple requests for the same owner, make all of them at the same time. However, you should avoid blanket requests; be as specific as possible in each case. (AAP, p. 42)

A FINAL WORD: CONTRACTS

Most applicants only see the guidelines and application forms prior to submitting a grant. However, many of the specific copyright requirements and protections are spelled out in the contract. Therefore, if you foresee any copyright issues arising in your project, ask to see the contract before submitting the application. Read the provisions carefully and, if any seem to conflict with your plans, talk to your state committee staff; in many cases provisions in the grant contract can be tailored to meet the specific needs of the project. In fact, if you have special copyright needs, explain them in the application itself and make sure that they are addressed in the contract you are asked to sign. In some cases, of course, the interests of the applicant and the committee are irreconcilable, but in most instances a compromise can be reached and incorporated into the contract. But the greatest danger is conflict arising out of confusion and misunderstanding, a situation produced when both parties fail to converse before the contract is signed.

NOTE

1. The foundation of "product and protection" must be cemented by the mortar of a rudimentary knowledge of basic copyright issues. Thus, the General Guide to the Copyright Act of 1976, written in September, 1977 and available from the Copyright Office, is a must for the state councils and project directors. The 200-page Guide was written by Marybeth Peters, Senior Attorney-Advisor to the Copyright Office regarding the re-write of the Copyright Act. Ms. Peters' text is a unique blend of readability and precision, a Baedeker indispensable to the traveler of this foreign terrain. The Guide is not meant as an official summary of the 1976 Act, nor is it an attempt to resolve the many legal questions raised by the new law. Ms. Peters' prose is occasionally subjective but always informative. Indeed, I have taken the liberty of using the Guide extensively in this essay. Whenever possible, I have noted paraphrases or direct quotes with the word "Guide" and the appropriate page number for easy reference.

SUPPLEMENTAL READINGS

The Copyright Office has issued a series of publications which you might be interested in getting for your library. These materials can roughly be divided into three categories: general information, topical, and documentary.

General information can be found in the various procedural circulars. "Circular 1" offers background on the nature of copyright, what can and cannot be copyrighted, who can claim copyright, procedures for copyrighting published and unpublished works, duration of copyright, and so forth. "Circular R-99" focuses upon the changes wrought by the new Copyright Act of 1976. Information about the location and display of copyright can be found in "Circular 3," while a schedule of fees is given in "Circular 4." Other important procedural circulars are "Diration of Copyright" (R-15a), "Fair Use" (2), "How to Investigate the Copyright Status of a Work" (22), and "Renewal of Copyright" (R-15). A general bibliography of works published by the Copyright Office can be found in "Circular 2."

The numerous topical circulars explore specific types of products eligible for copyright. Those circulars most relevant to the state committees include:

Audiovisual Material	Circular 49
Books and Pamphlets	" 60
Contributions to Periodicals	" 42a
Dramatic-Musical Works	" 48
Looseleaf Publications	" 65
Motion Pictures	" 45
Musical Compositions	" 50
New Versions and Reprints	" 14
Periodicals	" 42
Photographs	" 40j
Pictorial, Graphic, and Sculptural Works	" 40
Poems and Song Lyrics	" 67
Prints and Pictorial Illustrations	" 40k
Radio and Television Programs	" 47
Recording Rights and Musical Compositions	" 51
Sound Recordings	" 56

The third category of Copyright Office publications, documentary, should only be considered by the pure of heart. If you want, for $13 you can obtain the Compendium of Copyright Office Practices, a looseleaf publication which is periodically updated. The Compendium is an encyclopedia of the ever-changing policies of the Copyright Office. Even more encyclopedic, you can purchase current and back issues of the Catalog of Copyright Entries. Published semi-annually, this tome lists all copyrights filed in the various classes.

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